

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

ERIC HU, EDWIN ANTONIO SURIS,
TIMOTHY SMITH, ROY NORMAN
MORROW, MING HUI LIN, NANCY
BATALAS, JAMES LAFATA, DANIEL
DAVID KATTAN, TRACY EVETTE
STARLING, CHRISTOPH B. OH, HECTOR
ANDREW CORDERO, YO-YO CHEN,
MANISHA REDDY NARAYAN, on behalf
of themselves and all others similarly situated,

Plaintiffs,

v.

WHALECO, INC., d/b/a Temu,

Defendant.

Case No. 23-cv-06962-MKB-RML

***ZIBOUKH PLAINTIFFS’
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL AMICUS CURIAE
BRIEF***

The *Ziboukh* Plaintiffs respectfully request that the Court grant them leave, as amici curiae, to file the attached Supplemental Amicus Curiae Brief to respond to issues raised in Defendants' Response to their Amicus Brief. *See* ECF 45 (Pltff. Amicus Brief) and ECF 50 (Def. Response). *Ziboukh* Plaintiffs believe that the Supplement would further aid the Court in deciding the motion to compel arbitration (ECF 36) and is necessary to respond to new arguments and factual material Defendants submitted in their Response brief.

First, in their Response, Defendants have raised arguments to which *Hu* Plaintiffs and amici have not had an opportunity to respond. For example, Defendants' primary argument in response to *Ziboukh* Plaintiffs' contentions that there was no contract formation, and that the arbitration clause is procedurally and substantively unconscionable, is that these issues must be decided by the arbitrator, rather than the Court. (Def. Resp. at 8-20.) Such arguments are contrary to Second Circuit law requiring the Court to ascertain that there is an agreement to arbitrate before it may compel arbitration (or before it may enforce any purported agreement to delegate these issues to an arbitrator). Furthermore, Defendants' arguments are also contrary to the plain language of the arbitration agreement, which does not purport to delegate such issues to an arbitrator.

In addition, Defendants assert that *Hu* Plaintiffs lack standing to raise the issue of unconscionability of the batch arbitration provisions because there are allegedly not enough class representatives to trigger those provisions. However, Plaintiffs' counsel have been contacted by thousands of individuals who would like to bring a claim. If arbitration were initiated, there would be more than enough claimants for batch arbitration. Moreover, between *Hu* and *Ziboukh* there are sufficient class representatives in the aggregate to trigger batch arbitration.

Second, Defendants have cited new factual material, such as an alleged review of the arbitration agreement by the American Arbitration Association to ascertain whether it satisfies minimal “due process.” (Def. Resp. at 12.) The primary issue here is not whether the arbitration agreement satisfies the AAA’s minimum “due process” standard. Nonetheless, Plaintiffs should have an opportunity to respond to such new factual material, which also further demonstrates why discovery is warranted.

WHEREFORE, Ziboukh Plaintiffs respectfully request that this Court enter an order granting them leave, as amici curiae, to file the attached Supplemental Amicus Curiae Brief in Opposition to Defendants’ Motion to Compel Arbitration.

Dated: September 9, 2024

Respectfully submitted by,

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/s/ Jeannie Evans

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2024, a true and correct copy of the foregoing was filed electronically by CM/ECF, which caused notice to be sent to all counsel of record.

/s/ Jeannie Y. Evans

Jeannie Y. Evans